Supreme Court, U.S.
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No. 99-289

In The

Supreme Court of the United States

AVIS W. BUTLER,

Petitioner,

versus

COUNTY OF ORANGEBURG, SOUTH CAROLINA and DONNIE L. HILLIARD in his individual and official capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. Petitioner incorrectly asserts that there is a split of authority on the issue of whether one must have a subjective or objective belief that a practice they oppose under Title VII is unlawful.

Petitioner claims that this Court should grant certiorari because the federal circuits are split as to whether a plaintiff's belief that she opposed a practice made unlawful by Title VII is measured by a subjective or an objective standard. She correctly states that the Fourth, Eighth, Ninth and Eleventh Circuits include an objective component in their analysis. She then claims that the Fifth and Seventh Circuits, along with, surprisingly, the Ninth Circuit again, utilize a standard of subjective good faith. Petitioner is under the mistaken belief that a standard of "objective reasonableness" is a different, higher standard than one which requires "reasonableness." However, the cases she cites in support of this proposition prove otherwise.

Petitioner first cites *Pasqua v. Metropolitan Life Insurance Co.*, 101 F.3d 514 (7th Cir. 1996). In *Pasqua*, the Seventh Circuit affirmed the lower court's decision granting summary judgment, but found that the lower court erred in determining that the plaintiff could prove a *prima facie* case of retaliation. Petitioner quotes *Pasqua* to the extent that the decision notes the lower court's failure to correctly apply the "reasonable belief" standard. However, Petitioner omits that part of *Pasqua* wherein the court specifically states:

> Pasqua's *subjective* beliefs are irrelevant. Pasqua was required to establish that he had a *reasonable* belief that the rumors amounted to harassment based upon sex.

Id. at 518 (emphasis added).

This language makes it quite plain that an objective standard is one of reasonableness, while a subjective standard is one of good faith. The Seventh Circuit clearly applies the former. The lower court's confusion in *Pasqua*

as to how to apply that standard is irrelevant to this case.[1]

Petitioner also cites *Moyo v. Gomez*, 40 F.3d 982 (9th Cir. 1997) to support her claim. There, the Ninth Circuit stated the standard to be applied quite plainly:

> The reasonableness of Moyo's belief that an unlawful employment practice occurred must be assessed according to an *objective* standard . . .

Id. at 985 (emphasis added).

Again, Petitioner has cited a case which is directly contrary to her position.

Finally, Petitioner cites *Long v. Easterfield College*, 88 F.3d 300 (5th Cir. 1996). There, the court used neither the words "objective" nor "subjective" in discussing the appropriate standard. However, the court used the same language as *Pasqua* in stating that the touchstone is whether the plaintiff had a " 'reasonable belief' that the [offender's] conduct violated Title VII." *Id.* at 305. While not specifically calling this an objective standard, the fact that the belief must be reasonable makes that point quite obvious. Further, recent district court decisions in the Fifth Circuit set forth this standard unequivocally. *Byers v. The Dallas Morning News, Inc.*, 1999 WL 20953, *10 (N.D.Tex. Jan. 7, 1999) (summary judgment proper where plaintiff's opposition not "objectively reasonable"); *accord, Turner v. Claims Administration Corp.*, 993 F.Supp. 982, 989 (N.D.Tex. 1998); *Fritz v. Integrated Health Services, Inc.*, 1997 WL 472498, *3 (N.D.Tex. 1997) (unpublished opinion); *Harvey v. Chevron U.S.A., Inc.*, 961 F.Supp. 1017,

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[1] The lower court in *Pasqua* relied on *Jennings v. Tinley Park Community Consolidated School Dist. No. 146*, 796 F.2d 962 (7th Cir. 1986), which requires a plaintiff to prove that he held a "reasonable belief" that he was opposing a practice unlawful under Title VII. *Id.* at 967. The *Pasqua* lower court then applied this standard in a subjective fashion, with no analysis of whether a reasonable person would have held the same belief. *Pasqua v. Metropolitan Life Insurance Co.*, 1995 WL 683772, *7 (N.D.Ill. 1995) (unpublished opinion).

1033 (S.D.Tex. 1997) (relying on Eleventh Circuit precedent).

The cases cited by Petitioner to support her contention do not do so because there is no split of authority on this issue. In fact, these cases only prove that the objective standard utilized by the lower court in this case to grant Respondent's motion for summary judgment is universally recognized.

This standard was implicitly adopted by this Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), wherein the Court stated, "Conduct that is not severe or pervasive enough to create an *objectively* hostile or abusive work environment – an environment that a *reasonable person* would find hostile or abusive – is beyond Title VII's purview." *Id.* at 20 (emphasis added). It should be (and is) applied by the district courts to opposition retaliation cases as well. To hold otherwise would lead to absurd results. In cases such as this one, where the opposition was by one with no first-hand knowledge of the underlying facts, such a contradictory standard would require the alleged victim of the harassment to meet an objective standard while the party opposing the harassment (but who did not witness it) would be invariably protected by her own subjective beliefs.

Accordingly, the petition for a writ of certiorari on this ground should be denied.

II. Petitioner's remaining grounds fail to justify a writ of certiorari because she does not dispute the lower court's finding that she cannot prove pretext as to the legitimate non-discriminatory reasons offered for her termination.

Petitioner asserts that this Court should grant her petition because the lower court held that she could not satisfy a *prima facie* case of retaliation. However, the lower court did not conclude its analysis there. The court held that even if Petitioner could make out a *prima facie* case, she could not prove pretext as to the numerous,

legitimate, non-discriminatory reasons for her termination. Petitioner assigns no error to this alternative basis for summary judgment.

To survive summary judgment, Petitioner was obligated to offer evidence which would allow a reasonable jury to determine that the reasons given for her termination were pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 505-512 (1993). Because she assigns no error to the lower court's conclusion that she did not make this required showing, any argument over whether she made out a *prima facie* case of retaliation is academic. The Court should not expend its resources by deciding a question that will not affect the outcome of the case. Yet, by asking the Court to review whether she made out a *prima facie* case of retaliation when the district court held that even if she did, she made out no triable issue of fact on the issue of pretext, that is precisely what Petitioner is seeking. This Court's review of this case would be no more than an academic exercise.

III. Petitioner's assertion that the lower court incorrectly found that she lacked a property interest necessary to support a due process claim fails because she was an at-will employee as a matter of law.

Petitioner alleges that she attained regular status as a County employee and that she was, therefore, entitled to a grievance hearing regarding her termination. Viewing the facts in a light most favorable to Petitioner, the court considered her due process claim under 42 U.S.C. § 1983.

The court correctly ruled that Petitioner had no property right to continued employment. Such rights are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Under South Carolina law, county employees are presumed to be at-will absent evidence that the parties

have contracted otherwise. *Epps v. Clarendon County*, 405 S.E.2d 386 (S.C. 1991); *Stiles v. American General Life Ins. Co.*, 516 S.E.2d 449 (S.C. 1999).

In addition to South Carolina's presumption that County employment is at-will, Orangeburg County specifies by ordinance that its employees are at-will. Orangeburg County Code § 2-226. Accordingly, the district court properly held that Petitioner lacked a protectible property interest in her County employment because she failed to offer any evidence that her presumptive and statutory at-will status had been altered. [Pet. for Writ of Cert., Appendix C p. 25a-26a] *See, Bishop v. Wood*, 426 U.S. 341, 345-47 (1976) (an employee who served "at the will and pleasure" of a city had no entitlement under state law to his continued employment and therefore no property interest).

Finally, it should be noted that the court denied all of Petitioner's § 1983 claims against the county because she failed to timely request a grievance hearing per County ordinance. [Pet. for Writ of Cert., Appendix C p. 25a] The court correctly found that Petitioner cannot establish liability as to the County because her failure prevented the County from reviewing her termination. Accordingly, she cannot establish a governmental "policy or custom" of the County which caused her harm. *Morell v. Dep't of Social Services of the City of New York*, 436 U.S. 658, 694 (1978).

Accordingly, Petitioner had no property right to continued employment.

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Sec. 2-226. Purpose.

The purpose of the rules and regulations set out in this division shall be to establish a consistent personnel policy for the county and to establish guidelines governing employees of the county. Accordingly, this division shall not apply to employees of any outside agency that may receive appropriations from the county. It shall describe the county's general philosophy concerning policies and procedures and shall in no way form a contract between the employees and the county. The provisions of this division are subject to change at anytime upon being amended by ordinance of the county council. Further, notwithstanding any of the provisions herein, all employees of the county are employees-at-will who may quit at any time for any or no reason and who may be terminated at any time for any or no reason.

(Ord. No. 78-8-12, Pt. I(1), 8-28-78; Ord. No. 87-11-21, § 1, 11-2-87)